RECORD AND BRIEFS

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In The
# Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

*Petitioner,*

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY BRIEF SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

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## INTRODUCTION

Today, it is a state law crime for Monmouth Park to offer its patrons the opportunity to wager on the outcome of professional and amateur sports contests ("sports betting"). This is true not because New Jersey citizens or lawmakers want sports betting at Monmouth Park to be a crime, in fact the opposite is true, but only because a federal injunction requires state officials to treat that state law criminal prohibition as extant and binding state law, despite the repeal of such prohibition by the state lawmakers. This is a quintessential example of federal commandeering of state legislative and executive sovereign functions.

Respondents attempt to normalize this bizarre result. They portray PASPA as a commonplace federal statute with ordinary preemptive effect. They argue this case is a repeat of *Christie I* and no more deserving of this Court's attention than any other preemption case. They are wrong.

Federal statutes that preempt state law do so as a consequence of the creation of some federal rule governing commerce.[1] That's not what PASPA does. PASPA regulates the content of state law without any federal rule governing commerce as its foundation. After the expansion to PASPA's scope in *Christie II*, PASPA has now produced the extraordinary federal injunction ordering New Jersey officials to treat state

[1] The Commerce Clause is the only suggested federal power that could support PASPA.

law as prohibiting activity that New Jersey's citizens and lawmakers have chosen not to prohibit.

In urging this Court to wait for other circuits to weigh in, or for New Jersey's lawmakers to try again, respondents completely ignore the three decisions from state courts of last resort that conflict in principle with the decision below, fail to acknowledge that New Jersey already has lifted its prohibition on sports gambling at locations other than currently-licensed casinos and racetracks, and say not a word about the significance of the decision below for the numerous state laws authorizing daily fantasy sports wagering.

Petitioners have already relied once on what the court of appeals, respondents, and the United States said was permissible, only to have them change their minds when petitioners took them at their word. Delay in resolving the important legal issues in this case is unwarranted and will likely sound the death knell for Monmouth Park as a self-sustaining thoroughbred racetrack.

## I. THIS IS NOT AN ORDINARY PREEMPTION CASE.

Respondents argue that "PASPA is a straightforward exercise of Congress' power to preempt the operation of state laws that conflict with federal policy on matters within Congress' purview." Br. in Opp. 22. But unlike routine instances of preemption, PASPA does not establish an independent federal rule governing commercial conduct.

The Constitution "has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992) (citing *Coyle* v. *Smith*, 211 U.S. 559 (1911)); *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2602 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (noting that the Constitution "'simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.") (quoting *New York*, 505 U.S. at 178). Instead, the Constitution "gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York*, 505 U.S. at 178.

The Framers deliberately chose to have federal power operate directly on individuals, coupled with the Supremacy Clause, rather than to have federal regulation of States or state laws. *M'Culloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819) ("The government of the Union * * * is, emphatically and truly, a government of the people. * * * Its powers are granted by them, and are to be exercised directly on them."); *New York* v. *United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. * * * The allocation of power contained in the Commerce Clause,

for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). See also *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794-795 (1982) (O'Connor, J., dissenting); Jack N. Rakove, *Original Meanings*, 81-82, 171-177 (1996).

Congress certainly could have written PASPA differently so that it would have ordinary preemptive effect. Congress could have simply prohibited sports betting. In that case, sports betting would be illegal as a matter of federal law, and nothing in state law could provide immunity. That's how preemption works: Congress tells the people what they must do, what they may do, or what they can't do. The people must obey that federal law, and the courts, both state and federal, must decide cases in accordance with that federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. The Supremacy Clause merely "creates a rule of decision" and "instructs courts what to do when state and federal law clash." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The federal law stands on its own bottom, can be enforced without regard to state law, and requires nothing of state law other than it give way to superior federal law. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 252 (2000) (noting that "the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from

doing so, the Supremacy Clause requires courts to disregard the state rule and follow the federal one."); Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 38 (2005) (noting that preemption is the "doctrinal descendant" of the Supremacy Clause, which "acts as a conflict-of-laws principle that instructs courts to apply federal law in the event of a conflict with state law"); *Petersburg Cellular P'ship* v. *Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J.) ("Congress may govern directly the people * * * [b]ut it may not govern the states for the purpose of indirectly exacting its will on the people. Preemption involves the direct federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government * * * for federal ends.").

But PASPA was not written that way, nor is it what PASPA does. As respondents themselves put it, the "federal policy" adopted by PASPA is not aimed at sports gambling, but at "state-sponsored" sports gambling. Br. in Opp. at i. ("Congress enacted the Professional and Amateur Sports Protection Act ('PASPA') to stop the spread of state-sponsored sports gambling.").

PASPA prohibits the States from authorizing sports betting. That's not a regulation of commerce; that's a regulation of the States' regulation of commerce. That's not a federal law telling the people what they can't do, anything in state law to the contrary notwithstanding. That's not a federal law that stands on its own bottom requiring nothing of state law other

than to give way to superior law. Instead, PASPA is a federal law that dictates the content of state law. It can't be enforced without regard to state law, because its very point is to control state law – exactly what the Framers viewed as a "solecism in theory" that had been "exploded on all hands." The Federalist No. 20, p. 138 (C. Rossiter ed. 1961) ("a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."); 2 The Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.") (statement of James Madison).

This distinctive feature of PASPA produced the extraordinary injunction in this case. If PASPA were the ordinary Commerce Clause statute portrayed by respondents, state law could be displaced and state officials ordered to stand aside while federal law was enforced. Instead, state officials have been ordered to treat state law as prohibiting activity that state lawmakers, implementing the will of its citizens, have chosen not to prohibit.[2]

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[2] Petitioners do not attach some talismanic power to the word "repeal." Other words are equally able to express the point that state lawmakers have chosen to no longer prohibit certain conduct, yet a federal decree nevertheless requires state officials

On respondents' view, preemption is not simply the result of the rule of priority established by the Supremacy Clause, enabling Congress to enact laws governing commerce that are legally effective notwithstanding state law. Instead, on respondents' view, Congress has the power to decide what commercial activity States may not authorize, untethered to Congress' own direct regulation of commerce. Yet with years to look and much legal talent to do the looking, neither respondents nor any of the many judges who have heard this case have identified a single Act of Congress under the Commerce Clause (other than PASPA itself) that purports to preempt state law except as an adjunct to direct federal regulation (or deregulation). More than a year elapsed between the filing of the complaint in *Christie I* and Judge Vanaskie's observation that "PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited." *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 246 n.4 (3d Cir. 2013) (Vanaskie, J., dissenting) ("Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation."). Three more years have come and gone, and respondents have yet to find another example.

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to consider what was repealed (or lifted, removed, abrogated, annulled, revoked, withdrawn, rescinded, discontinued, or abandoned) as a still-standing state law prohibition of that conduct.

Petitioners' challenge does not threaten any of the statutes cited by respondents (other than PASPA itself). See Br. in Opp. at 24 n.4. So long as Congress establishes the rule by which commerce is to be conducted, contrary state law can be displaced, no matter how much that result disappoints any particular State. But what petitioners deny is that Congress can "preempt" state law by coercing state sovereign functions without creating a federal regulatory or deregulatory rule regulating interstate commerce.

## II. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION.

Most preemption cases present questions of statutory interpretation: how much of state law is displaced by the federal regulation (or federal deregulation). They rarely involve a challenge to the constitutionality of the federal statute.

But at the very least, PASPA raises serious constitutional concerns under the anti-commandeering doctrine, as the Third Circuit held in *Christie I*. In the absence of constitutional concerns, the most straightforward interpretation of PASPA would be that States cannot allow sports gambling. And given that PASPA was crafted before *New York* was decided, this might accurately reflect the mindset of the drafters.

If PASPA prohibits States from allowing sports gambling, it prohibits them from repealing prohibitions on sports gambling, and thereby requires them to

prohibit sports gambling. But that would plainly violate the anti-commandeering doctrine. *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

Respondents know this. That knowledge has produced the interpretive gymnastics that have plagued this litigation, with respondents and the lower courts first trying, in *Christie I*, to save PASPA by distinguishing between authorization and repeal. But when the State responded with a repeal, respondents and the lower courts tried again to formulate a construction of PASPA, attempting distinctions between partial repeal and total repeal, between permissible partial repeals and impermissible partial repeals (with the distinction between the two determined by the unhelpful and the undefined test of "common sense" (Audio of Third Circuit En Banc Oral Argument, http://www.ca3.uscourts.gov/oral-argument-recordings, of C.A. No. 14-4546 at 38th minute)), and even between acts that are repeals on their face and what respondents consider "true repeals." See Br. in Opp. at 29, 30. If PASPA is to be rescued with a savings construction, that savings construction should produce a workable legal standard to guide state lawmakers. The court of appeals has

surely not done that.[3] Worse, its attempted savings construction does not save: New Jersey officials are under a federal injunction that requires them to treat a state law criminal prohibition as valid and binding state law, even though state lawmakers have lifted that prohibition.

## III. CERTIORARI SHOULD BE GRANTED NOW.

Respondents would have this court wait until another State follows New Jersey's path, changes its law, fights with the Leagues in another circuit, and wins in that circuit. But the constitutional rights of one State and its people should not depend on a sister State successfully shouldering the burden of pursuing her own rights elsewhere. This is particularly true given that the anti-commandeering principle is clearly established by this Court and by the decisions of other courts of appeals, and the Third Circuit's opinion conflicts with that principle.

Respondents also completely ignore the three decisions from state courts of last resort that conflict in principle with the decision below. Those courts have recognized that the national government lacks the constitutional authority to require States to maintain state law prohibitions that the State chooses to lift.

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[3] The Third Circuit stated that it "need not * * * articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA" and admitted that it may be impossible for "such a line [to] be drawn." Pet. Appx. A at 24a.

See NJTHA Pet. at 11-12. See also Erwin Chemerinsky, *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015) ("Because Congress has the authority under the Commerce Clause to prohibit even the intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states' decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.") (footnote omitted).

Respondents also attempt to minimize the harm of delay, noting that the injunction does not prohibit New Jersey from trying again to remove its prohibitions on sports gambling in some still broader way that respondents might deem acceptable. But we've been down that road before. New Jersey shaped the 2014 Act in reliance on the statements of respondents, the United States, and the court of appeals. The lawmaking powers of a sovereign State should not be subject to a game of blind man's bluff – or worse, a game of chicken.

While suggesting that New Jersey can try again with a broader repeal, respondents incorrectly assert that New Jersey's current repeal is limited to "casinos

and racetracks licensed to offer state-authorized gambling." Br. in Opp. 23; see also Br. in Opp. at 30 (describing the 2014 Act as an "authorization for sports gambling to occur at the state's favored venues for state-authorized gambling"). But under the 2014 Act, sports betting is not illegal at "former" racetracks. Pet. Appx. H at 220a (" 'running or harness horse racetrack' * * * includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act"). There are now two former racetracks in New Jersey: Garden State Park ("GSP") and Atlantic City Racecourse. Neither of these former racetracks holds a gambling license. Indeed, the former GSP racecourse premises is currently the site of a privately owned shopping mall that houses retail stores like Bed Bath & Beyond and Home Depot. The stores in the mall are not "state-authorized" or "state-licensed" gambling venues. And if Monmouth Park were to become a former racetrack and give up its license, its premises would remain a location where sports betting is not illegal under the 2014 Act.

It would be ironic if respondents' enforcement of PASPA led New Jersey to lift its prohibitions on sports gambling still further in an effort to satisfy respondents. If this Court denies certiorari, Monmouth Park might not survive to see the day when New Jersey is sufficiently expansive in its removal of state law limitations on sports gambling to satisfy respondents. But right now, today, Monmouth Park's liberty is constrained by a state criminal law that is in force, not

because state lawmakers have so legislated, but only because federal officials have so decreed.

## CONCLUSION

This case presents a conflict between two profoundly different views of the distinction between permissible preemption and impermissible commandeering. For respondents, the difference is between negative commands and positive commands: Congress can prohibit but cannot mandate state action. For petitioners, the difference, drawn directly from *New York*, turns on whether Congress has created a rule that directly governs private behavior and thereby displaces contrary state law, leaving federal law to govern, or instead attempts to indirectly control private behavior through the States by mandating the content of state law or enforcement by state executives.

The petition should be granted.

Respectfully submitted,

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